IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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| STATE OF MARYLAND, et al.<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF EDUCATION, et al.<br><br>Defendants-Appellees. | ) | Nos. 20-5268 & 20-5283 |

**REPLY IN SUPPORT OF APPELLANT STATES' SUGGESTION OF MOOTNESS AND MOTION FOR *MUNSINGWEAR* VACATUR**

When a case becomes moots as it climbs through the federal judiciary, whether to vacate a lower court decision is an equitable question informed by fairness. *See Sands v. NLRB*, 825 F.3d 778, 785 (D.C. Cir. 2016). Fairness typically requires vacating a lower court decision when mootness resulted from the unilateral action of the prevailing party. *See Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018).

Although that is the case here, the Department of Education resists application of the ordinary rule because of the unique sequence of events in the district court. Specifically, the district court entered a non-appealable order dismissing the case on June 26 for the States' lack of Article III standing; the case became moot on July 1; and then on July 17 the district court issued a

memorandum opinion explaining the June 26 order and making that earlier order appealable. According to the Department, because the June 26 order was not an appealable order until after the case became moot on July 1, "final judgment was rendered because of circumstances within [the States'] control—namely, [the States] chose to press their case, refusing (until now) to concede that it became moot on July 1." Response to Suggestion of Mootness & Request for Vacatur ("Response") at 5. Therefore, the Department concludes, vacatur is not warranted. *Id.* But neither the States' conduct nor the unusual sequence of events below counsels against vacating the district court's decision.

First, the Department's response focuses on the wrong question. Vacatur is appropriate when the prevailing party caused the case to become moot. *Garza*, 138 S. Ct. at 1792. So whether the States could have prevented the district court from issuing an opinion that explained its already-rendered order is beside the point.

Second, although the Department maintains that vacatur would be improper because the States pressed on in the district court after the case became moot, the States, in fact, took no action after the case became moot—an event that happened after the district court had granted a motion to dismiss for lack of standing. The Department seems to fault the States for failing to ask the district court to dismiss the case under Federal Rule of Civil Procedure 41 sometime after July 1—even though the district court already had dismissed the case. Such a requirement would

be nonsensical. For the same reason, the Department's fear that vacating the decision below would encourage plaintiffs to litigate moot cases is misplaced. Moreover, this Court has advised district courts to avoid altogether the circumstance needed for the sort of conduct that the Department fears—namely, issuing an order followed later by an opinion that makes the prior order appealable. *St. Marks Place Hous. Co. v. U.S. Dep't of Hous. & Urban Dev.*, 610 F.3d 75, 81 (D.C. Cir. 2010). Thus, that peculiar pattern is unlikely to recur.

Third, as the Department notes, the June 26 order was not final for purposes of appellate jurisdiction. *See* Order at 2, ECF No. 106 (citing *St. Marks*, 610 F.3d at 80–82). But that does not mean the order had no effect on the proceedings in the district court. The June 26 order explicitly granted the Department's motion to dismiss. *Id.* The district court repeated in the July 17 opinion that the June 26 order dismissed the case. Mem. Op. at 48, ECF No. 107. Therefore, the event that mooted the case happened after the district court had dismissed the case on Article III grounds. The Department offers no explanation of what the June 26 order achieved or why the district court would have entered an order that had no effect. That the States may not have been able to immediately appeal the June 26 order does not change that that order dismissed the case for lack of standing.

If anything, the events below suggest even more strongly that vacatur is appropriate. Again, vacatur is an equitable remedy based in fairness. *Sands*, 825

F.3d at 785. Here, any uncertainty about what options were available in district court after the already-dismissed case became moot on July 1 results from the district court dismissing the case through a non-appealable order, a practice that this Court disfavors precisely because it is liable to cause confusion and potentially endanger litigants' procedural rights. *St. Marks*, 610 F.3d at 81–82; *see also Ali v. Pruitt*, 727 F. App'x 692, 695 (D.C. Cir. 2018). So even if the States could have re-dismissed their case in the district court, that unusual option does not make vacating the decision below any less fair.

Finally, while the States agree that the decision below does not have preclusive effect on any other litigation, *see* Response at 6, the decision below still may impair future litigation. Indeed, States' standing to sue the federal government is a commonly litigated question and one that is about to be briefed—based on similar theories of standing that were addressed below—in the same district court. *See Pennsylvania v. DeVos*, No. 20-1719 (D.D.C., filed June 24, 2020). Not only that, but the decision below was wrong under this Court's precedent and explicitly departs from how other circuits have resolved similar questions of state standing. Mem. Op. at 38–41.

For these reasons, the States respectfully request that the Court vacate the district court's Order, ECF No. 106, and Memorandum Opinion, ECF No. 107, and remand with instructions to dismiss the case as moot.

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 13, 2020, I electronically filed the foregoing document with the Clerk of the Court by using the appellate CM/ECF system. I also certify that the participants in the case that are registered CM/ECF users will be served via the CM/ECF system.

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## CERTIFICATE OF COMPLIANCE

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